De Jana Industries, Inc. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO.[1] Cases 29–CA–14349, 29–CA–14352, 29–CA–14583, and 29–CA–14604

December 13, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 14, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

The judge found, inter alia, that the Respondent discriminatorily discharged employee Anthony Barton in violation of Section 8(a)(3) and (1). Barton, a driver in the Respondent's solid waste division, did not possess a valid driver's license at the time of the hearing. Acknowledging this, and pursuant to the Board's Order in *Future Ambulette*, 293 NLRB 884 (1989), enfd. as modified 903 F.2d 140 (2d Cir. 1990), the judge recommended that he be made whole and that the Respondent be required to offer him reinstatement to a driver position when he establishes that he has a valid driver's license. The judge further recommended that, should Barton be unable to obtain a valid license within a reasonable time from the date of the Board's Decision and Order, the Respondent be required to offer him a substantially equivalent position and, if none exists, to make him whole until he acquires substantially equivalent employment elsewhere.

We adopt the judge's recommendations in this regard. In light of the Second Circuit's modification of the Board's Order in *Future Ambulette*, supra, we think it appropriate to discuss some of the implications of our Order in the instant case. First and foremost, Barton, like all discriminatees who have been unlawfully discharged, has a duty to mitigate the damages resulting from the Respondent's unlawful conduct. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 901 (1984); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941). Thus, he must with reasonable diligence: seek interim employment from the time of his discharge until his reinstatement; attempt to secure an appropriate driver's license; and, if necessary, seek substantially equivalent employment elsewhere. See, e.g., *American Bottling Co.*, 116 NLRB 1303, 1307 (1956). The measure of Barton's mitigatory efforts is a matter for compliance. See, e.g., *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255–256 (9th Cir. 1978), enfg. 227 NLRB 1670 (1977). See also *Sure-Tan*, supra at 902.

Further, nothing in our Order requires the Respondent to engage in illegal conduct, nor should the Order be interpreted to encourage such conduct. Thus, the Respondent has no obligation to reinstate Barton *as a driver* until he demonstrates that he has an appropriate driver's license. To the extent our Order may require that the Respondent offer him employment even without a driver's license, we note that the record establishes that there are two basic classifications in the Respondent's solid waste division: driver and loader. The loader, or helper, is the second man on a truck and, although the issue has not been conclusively litigated, it is apparent that a helper's official job duties do not include driving the truck. We also note that Barton's testimony indicates that he worked for the Respondent as a helper in addition to working as a driver. If Barton is unable through reasonable diligence to obtain a driver's license, then the Respondent's possible obligation to offer him substantially equivalent employment will become a relevant issue to be addressed in a compliance proceeding.

Finally, we view the instant remedy as an appropriate, measured exercise of our affirmative remedial authority, specifically designed to carry out our statutory obligation to effectuate the policies of the Act. In this case, Barton was a union adherent discharged because of his statutorily protected activity and in order

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In the section of the judge's decision entitled ''Hatcher's Claim for a Christmas Bonus and Vacation Pay,'' the second sentence of the second paragraph should read: ''Hatcher further testified *that Lapham said* that it was important that he vote and that he would be receiving a Christmas bonus.'' Also, the judge made several inadvertent references to the Respondent's ''Port Jefferson facility'' when in fact the facility at issue is in Port Washington, New York. None of these errors affect the results.

[4] The judge's recommended Order does not contain remedial provisions corresponding with his conclusion, which we affirm, that the Respondent unlawfully imposed on its solid waste division employees stricter work rules and disciplinary procedures, and new restrictions on employee access to certain parts of its facility. Accordingly, we will modify the recommended Order to include a cease-and-desist remedy, and a requirement to rescind both the new rules and procedures, reflected in a 4-page document added to the Respondent's employee handbook, and the restrictions on access to the Respondent's main office, mechanics' shop, yard, and field trailer. See, e.g., *John Cuneo, Inc.*, 253 NLRB 1025, 1028–1029 (1981), enfd. sub nom. *Plumbers Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982).

to discourage other employees from supporting the Union. The Respondent's contention that he was discharged because he did not possess a driver's license was proved to be the sheerest of pretexts.[5] Consequently, absent the unlawful discrimination directed against him, Barton would, so far as the record shows, still be working for the Respondent, either as a driver or in some other capacity. Accordingly, because Barton has been unlawfully deprived of his job, his right to reinstatement and corresponding right to backpay, both as discussed above, become effective on the date he was discharged. Our remedy is thus fashioned specifically to restore the status quo ante to the extent reasonably possible. *Sure-Tan*, supra at 900; *Phelps Dodge*, supra at 194.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, De Jana Industries, Inc., Port Washington, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(j) and reletter the subsequent paragraph accordingly:

''(j) Imposing stricter work rules and disciplinary procedures on its solid waste division employees and restricting their access to previously open areas of the Respondent's Port Washington facility in order to discourage them from supporting the Union.''

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

''(d) Rescind the discriminatory work rules and disciplinary procedures reflected in the four-page document entitled 'Disciplinary Procedures–-Solid Waste Division' which was added to the Respondent's employee handbook, and rescind the discriminatory restrictions on employee access to the main office, mechanics' shop, yard, and field trailer at the Respondent's Port Washington facility.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question our employees as to their support for Local 813, International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT threaten to close down or discontinue our solid waste division operations in order to discourage our employees from supporting the Union.

WE WILL NOT warn our employees that their wages will be reduced if they support the Union.

WE WILL NOT threaten to impose on them more onerous working conditions or stricter work rules, in order to discourage their support for the Union.

WE WILL NOT grant a loan to any employee to discourage support of the Union.

WE WILL NOT issue written warnings to employees to discourage them from supporting the Union.

WE WILL NOT fail to pay any employee a Christmas bonus or accrued vacation moneys in order to discourage support for the Union.

WE WILL NOT offer to reinstate any employee to his job on condition that he withdraw his support of the Union.

WE WILL NOT discharge any employee in order to discourage support for the Union.

WE WILL NOT impose stricter work rules and disciplinary procedures on our solid waste division employees, and WE WILL NOT restrict their access to previously open areas of our Port Washington facility, in order to discourage them from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

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[5] For example, on the day of his discharge the Respondent's vice president told Barton he could have his job back if he withdrew his union authorization card.

[6] In considering the application of the Board's remedy in *Future Ambulette*, supra, to this case, we note that the Board did not address the effect of a failure on the part of the discharged driver to take reasonable steps to secure an appropriate license. Should Barton not be diligent in attempting to get his license, it would have an impact on his right to reinstatement as a driver, in that without a license he would not be qualified to drive the Respondent's trucks. We further note that a failure on Barton's part to act diligently in this regard would not bar him from showing overall reasonable efforts at obtaining interim employment. Backpay rights are not dependent on efforts to seek precisely the same type of employment from which the discriminatee was discharged. See *Associated Grocers*, 295 NLRB 806 (1989). Finally, should Barton fail to take reasonable steps to secure a license, his reinstatement and consequent gross backpay rights would be based on his entitlement to employment as a truckdriver's helper, a position he had held in the past and could have continued to hold even without a license, were it not for the Respondent's discrimination against him. Compare *Providence Medical Center*, 243 NLRB 714, 738, 744–746 (1979) (employee Holzman).

WE WILL offer Eric Industrious, Willie Hatcher, and Nicola Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay and other benefits resulting from their discharges, with interest thereon, including moneys due Willie Hatcher for his 1989 Christmas bonus and accrued vacation pay.

WE WILL offer Anthony Barton full reinstatement to his former job on the presentation by him of a valid license. If he is unable to do so within a reasonable period of time from the date of the Board's Decision and Order in this case,

WE WILL offer to reinstate him to a substantially equivalent position, without prejudice to his seniority and other rights and privileges and WE WILL make him whole for any loss of pay and other benefits resulting from his discharge, with interest thereon.

WE WILL remove from our files all references to the discriminatory discharges of these four employees and to the two written warnings issued to Willie Hatcher on December 29, 1989, and WE WILL notify each of these four employees in writing that this has been done and that the unlawful conduct on our part will not be a basis for future personnel action against them.

WE WILL rescind the discriminatory work rules and disciplinary procedures reflected in the 4-page document entitled ''Disciplinary Procedures–-Solid Waste Division'' which was added to our employee handbook, and

WE WILL rescind the discriminatory restrictions on employee access to the main office, mechanics' shop, yard, and field trailer at our Port Washington facility.

DE JANA INDUSTRIES, INC.

Craig Lawrence Cohen, Esq., for the General Counsel.
Stanley Israel, Esq. (Israel & Bray), of New York, New York, for De Jana Industries.
Stuart Bochner, Esq., of New York, New York, for Local 813.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. These cases had been consolidated with Case 29–RC–7443 which was severed at the conclusion of the hearing.[1] The consolidated complaint alleged that De Jana Industries, Inc. (Respondent), to discourage its employees from supporting Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Union), unlawfully interrogated them as to their support for the Union, threatened and warned them, imposed more onerous work rules, granted loans, withheld bonuses and accrued vacation pay, unlawfully conditioned a reinstatement offer and discharged four employees. Respondent is alleged thereby to have engaged in unfair labor practices as defined in Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act).

Respondent, by its answer, denies that it committed any of the alleged unfair labor practices.

The hearing was held before me in New York City in June and July 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. COMMERCE AND LABOR ORGANIZATION STATUS

The pleadings establish, and I find, that Respondent provides trash removal and related services pursuant to its contracts with various municipalities and that, in its operations annually, it meets the Board's standard for the assertion of jurisdiction. The pleadings also establish and I further find that the Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent has about 14 employees, drivers and helpers, in its solid waste division. They work out of Respondent's facility in Port Washington, New York, and are the only group of its employees involved in this case. They collect garbage and trash from private residences in the municipalities under contract with Respondent. These employees were unrepresented for purposes of collective bargaining when one of the Union's business representatives, Sylvester Needham, undertook to organize them in 1989. All dates below are for 1989 unless stated otherwise.

On about September 6, Needham sought out these drivers on their routes. On September 11, he talked with two of them Anthony Barton and Robert Anchelowitz. They signed authorization cards that day and were given additional cards to distribute to their coworkers. William Hatcher, a driver, signed an authorization card that day. Eric Industrious, another driver, signed a card on September 12.

Alleged Unlawful Interrogation and Warnings Between September 12 and 20

Eric Industrious, when asked by General Counsel about any conversation he had after September 12 while out on his route, testified that Steve Lapham, the manager of Respondent's solid waste division, asked him if he had seen ''Sylvester.'' Industrious related that he asked Lapham who Sylvester was and that Lapham responded that Sylvester was a union representative. Industrious further testified that Lapham then told him that ''if you all want to join the [U]nion, it will be fine [but the] only benefit you will get is dental . . . and besides pay will be cut and so you won't be gaining nothing.'' Later, in the course of his testimony, Industrious related that Lapham made those remarks before he signed his authorization card. He was not asked how long before but I understood, from the overall context, his testimony to be was that the discussion took place shortly before he signed his union card.

[1] I issued a supplemental report in Case 29–RC–7443, JD(NY)–122–90.

Lapham testified that he had heard from more than one driver that ''Sylvester'' or ''the Union'' had stopped them enroute and that he, Lapham, probably would have asked the drivers if Sylvester had stopped them. He related that he had no specific recollection of any particular conversation he had with any of the drivers. He denied that he told any driver that his pay would be cut. He also testified that he did tell the drivers, shortly before the election referred to below, that their wages could go up or down, depending on negotiations with the Union, if it won.

Industrious' account impressed me as candid and, as discussed below in other sections of this decision, I found other aspects of Lapham's testimony to be unpersuasive. I credit Industrious' testimony.

As Lapham's questioning of Industrious was specifically aimed at soliciting information as to the extent of employee activity relative to the Union and as the questioning was in the context of a warning that drivers' wages would be reduced if they selected the union as their representative, Respondent, by Lapham's statement, interfered with employee rights protected by Section 7 of the Act. See *Cannon Industries*, 291 NLRB 632 (1988).

The Discharge of Anthony Barton—Related Allegations

Barton, as noted above, had signed a union authorization card while on his route on September 11. Also, as just noted, Lapham had on September 12 questioned and warned Industrious while he was on his route.

On September 18, Lapham informed Barton that he was discharged because he did not have, and would not soon get, a valid driver's license.

Barton testified that he spoke with Respondent's vice president, Vincent De Jana, later on September 18 and asked how could he have been fired with Christmas coming up. Barton related that De Jana replied that he, Barton, had signed a union card behind his back and that Barton was the one who was going around having employees sign union cards. According to Barton, he told De Jana that it was Robert Anchelowitz, not him, who was passing out union cards. At that point, according to Barton, De Jana told him that, if he wanted his job back, he should get his union card back. De Jana also said, according to Barton, that if the Union came in, he would honor his contracts but, when they expired, that would be the end of the garbage business for Respondent.

De Jana testified as follows respecting Barton's asking him on September 18 for his job back. He asked Barton where ''he had been several days before . . . [but] he had no explanation.'' He asked Burton if he had been so drunk recently that he could not work. He asked Barton ''if he had gotten his license together'' although he, De Jana, knew that Barton had not. He told Burton that he could not keep him unless he, Barton, could get his license immediately. De Jana knew that Barton could not do that. De Jana denied that he discussed the Union with Barton in any way.

I credit Barton's account as it seems unlikely that he would concoct a story that he named a coworker as the union activist in exchange for keeping his job. De Jana's testimony struck me as a summary of Respondent's contentions, discussed below, rather than as a believable account of a conversation he had with an employee who came to him for help in keeping his job.

Based on the credited testimony, I find that Respondent, by De Jana, unlawfully interrogated Barton as to his having signed a union card, threatened to close down its operations,[2] and coerced Barton in an attempt to have him withdraw his support of the Union.

I turn now to the complaint allegation that Barton's discharge was discriminatorily motivated. The credited evidence demonstrates that Barton supported the Union, that Respondent was aware of that, that Respondent engaged in conduct clearly disclosing its union animus and that Barton was discharged at the very outset of the Union's organizational drive. In addition, General Counsel has produced evidence that Respondent had known for over a year prior to September 1989 that Burton did not possess a valid license and that Respondent had, until the Union began its drive, merely urged him to rectify the matter. It was only after the Union appeared that Respondent showed any urgency on the matter of Barton's license.

All these factors satisfy me that General Counsel has established a prima facie showing that Burton was discharged to discourage support for the Union among its solid waste division employees. The burden then is on Respondent to establish that, regardless, Barton's employment would have been terminated on September 18. See *Wright Line*, 251 NLRB 1093 (1980). Respondent has offered no persuasive basis on which I could find that, notwithstanding, it still would have discharged Burton. Rather, its recital of Barton's varied work derelictions during his employment, as alluded to in part by De Jana's testimony recounted above, suggests only that it could have discharged Barton for cause at almost any time. The credited evidence, however, discloses that, while it could have discharged Barton for not being able to produce a valid license, it chose instead to condition his employment status on his withdrawing his support for the Union.

I therefore find that Barton was discharged by Respondent in order to discourage its employees from joining or supporting the Union.

Discharge of Eric Industrious

Industrious began driving for Respondent on July 17, 1988. As noted above, he had signed an authorization card for the Union and had been unlawfully interrogated and warned by Lapham as to the efforts of union representatives to solicit his support. On September 20, he attended a union meeting. He was informed on the following morning by Respondent's vice president, De Jana, that he was discharged because he had missed picking up garbage on September 18 at homes on a whole street of his route.

Industrious testified that he had received a telephone call on September 18 from Lapham who asked if he was aware that he had missed a number of pickups. Industrious replied that he was not. According to Industrious, he and Lapham discussed how he had run his route that day and that Lapham then told him that it was ''all right'' as he, Lapham, had

[2] One of General Counsel's witnesses, Willie Hatcher, testified that De Jana made a similar threat at employee meetings held prior to the election in December in Case 29–RC–7043. There is no complaint allegation relating to that testimony and General Counsel does not rely on it in the arguments he has made. Accordingly, I attribute no weight to that testimony.

taken care of the missing stops. Industrious worked on September 19 and 20 without incident.

The facts above show that Industrious was discharged after having been subjected to unlawfully interrogation and a related warning against supporting the Union, that his discharge occurred on the morning after he had attended a union meeting and that the reason given for his discharge appears to be an afterthought on Respondent's part. On that last point, I note that it was De Jana who told Industrious he was discharged, not Lapham who handles the day-to-day operations of the solid waste division. I note too that the basis cited by de Jana was an event that took place 3 days previously and that Industrious had worked without incident in the interim. I note also that Lapham had indicated that he had condoned Industrious' lapse on September 18.

The suddenness of Industrious' discharge, its timing in relation to the onset of the Union's organizational campaign and to his attendance the preceding night at a union meeting, the pretextual nature of the reason proferred by Respondent for his discharge and the coercive interrogation of, and the threat to him on September 12 establish a prima facie showing that he was discharged as part of Respondent's efforts to undermine support for the Union among its solid waste division employees. While there is no direct evidence that Respondent was aware that Industrious was a union supporter, it is equally true that such knowledge may readily be inferred from the surrounding circumstances. See, for example, *Dr. Frederick Davidowitz*, 277 NLRB 1046 (1985).

Respondent endeavored to show that its discharge of Industrious was consistent with its past practice. The several instances it cited are not persuasive as the employees involved in those instances had voluntarily abandoned their jobs whereas Industrious had, as noted earlier, continued to work after September 18, without incident, until discharged.

Accordingly, I find that Respondent has not rebutted the prima facie case and that its discharge of Industrious was therefore discriminatorily motivated.

The Loan to Willie Hatcher

Hatcher began working for Respondent in its solid waste division in August 1987. On September 11, he signed a union authorization card given him by Anchelowitz.[3] On September 20, Lapham unexpectedly gave him $500 as a loan to be used to pay fines he owned and which had to be paid before he could obtain a renewal of his driver's license.

Hatcher had requested such a loan some 6 months previously when he had been arrested for driving with a suspended license and bailed out by Respondent. His request then was denied on the ground that it was against company policy to grant loans. (Incidentally, Lapham since March, changed Hatcher's route so that he would not have to drive in the township in which he had been arrested for not having a valid license. That treatment contrasts markedly with that accorded Barton in September when he was discharged purportedly for not being able to produce immediately a valid driver's license.)

General Counsel's contention, respecting that loan to Hatcher, is that Respondent, on September 20, was unaware that Hatcher supported the Union and that Respondent's sudden reversal then of its no-loan policy was intended to induce Hatcher to forego supporting the Union. In further support of that contention, Hatcher testified credibly as found infra, that after the election in December, De Jana berated him saying that Hatcher had betrayed him by voting for the Union after he, De Jana, had given him a loan to straighten out his license.

Respondent offered Lapham's testimony as to the basis for its granting Hatcher a loan in September. Lapham testified that Hatcher had asked for the loan then and as his license could be obtained simply by an advance of money, his request was granted.

Hatcher's account as to the circumstances and timing of the loan is convincing and I accept it. The sudden granting of the loan, its timing in relation to the Union's organizational effort, the unexplained reversal of company policy and the later remarks of De Jana all establish quite clearly that the belated honoring of Hatcher's request for a loan was directed towards discouraging employees from supporting the Union.

Alleged Unlawful Interrogation by Lapham in October

Hatcher testified that, in October, while he was out on his route, Lapham met him and asked if he was happy now that he had a steady route. Lapham, according to Hatcher, also asked him then if he had talked to any union representative and if he had signed a union authorization card.

Lapham, as earlier noted, testified that he had asked drivers if Sylvester Needham, the Union's representative had stopped them on their routes.

I credit Hatcher's account.

Hatcher's Claim for a Christmas Bonus and Vacation Pay

The complaint alleges that Respondent unlawfully failed to pay Hatcher a Christmas bonus for 1989 and his vacation pay.

Hatcher testified that, on December 21, he received a telephone call from Lapham who reminded him to be on time the next morning to vote in the election to be held in Case 29–RC–7443 among the solid waste division employees. Hatcher further testified that it was important that he vote and that he would be receiving a Christmas bonus. Hatcher related that he then asked Lapham if he would get paid for his vacation weeks and that Lapham said that he would have no problem, that he would get his money in the first or second week of January 1990.

Hatcher voted in the election on December 22 and left on his route. The tally of ballots in Case 29–RC–7443 disclosed that the Union received a majority of the votes cast. Later, upon returning to Respondent's facility, Hatcher was handed

[3] Anchelowitz was named by Anthony Barton, as discussed above, as the employee who was passing out union authorization cards to other drivers. Anchelowitz had signed a union card on September 11. The route on which he worked was operated pursuant to a contract with a municipality and that contract expired sometime after the election in December. Anchelowitz received a Christmas bonus in 1989 and was offered a different route when his regular route ceased to operate upon the contract expiration. Respondent urges that its treatment of Anchelowitz, apparently one of the strongest union supporters, negates a finding that it harbored any union animus. Anchelowitz left Respondent's employ of his own volition; there is no complaint allegation of discrimination against him. The limited evidence relative to Anchelowitz is hardly a basis to disregard the ample evidence of animus in this case.

his paycheck by Respondent's vice president, De Jana. Hatcher testified that De Jana then said to him, ''[T]hank you very much, but you f—d me by voting for the [U]nion.'' Hatcher testified that he asked how did De Jana know how he voted and that De Jana replied that he knows his friends, that Hatcher is not one of them and that Hatcher had repaid the kindness shown him, in having been given a loan, by voting for the Union. Hatcher related that De Jana then said that there will be changes made.

Hatcher did not receive a Christmas bonus for 1989 nor pay for his vacation weeks.

Lapham testified that he telephoned all eligible voters on December 21 to remind them to vote and denied discussing with any of them the subjects of a Christmas bonus or vacation pay. He testified that in 1988 he recommended that all drivers be given Christmas bonuses and that, in 1989, only several. He testified that he did not follow up to find out if his recommendations were followed and that he does not know which employees received bonuses.

De Jana testified that he has little day-to-day contact with the drivers involved in this case and that, while he relied on Lapham's recommendations, he himself decided the amounts of the bonuses.

I find it difficult to accept Lapham's account that he, the person in direct charge of these employees, did not bother to learn if the recommendations he made respecting their bonuses were accepted, particularly as some in 1989 got relatively huge bonuses compared to the ones they had received in 1988 and as others got no bonuses in 1989 after having received bonuses in 1988.

I credit Hatcher's testimony as to his discussions with Lapham and De Jana.

Based on the credited testimony, I find that Respondent failed to give Hatcher a bonus in 1989 and failed to pay him for his vacation weeks and that Respondent failed to do so because its vice president believed that Hatcher had voted for the Union. Further, Respondent, by De Jana's comments on December 22 to Hatcher, threatened to make changes in working conditions in retaliation for the employees having voted for the Union.

Work Rules

The complaint alleges that on about December 29 and 30, Respondent imposed more onerous working conditions and established stricter work rules for its solid waste division employees in order to discourage them from engaging in activities protected by the Act.

On December 29, Respondent promulgated written work rules applicable to the solid waste division employees. These rules were later incorporated in a four-page document entitled ''Disciplinary Procedures Solid Waste Division,'' which was added to Respondent's employee handbook. The handbook does not contain a similar document applicable to employees in Respondent's other divisions. The four-page document outlines procedures for the issuance of written disciplinary warnings, proscribed acts and penalties therefor, and detailed general conduct guidelines along with a statement that those listed guidelines are not to be considered complete.

On December 29, at a meeting of solid waste division employees, Respondent informed them that henceforth many parts of the Port Jefferson facility to which they previously had ready access were now off limits to them. On the following morning, William Hatcher was handed two written warnings based on incidents of asserted job carelessness which occurred during the preceding months.

The sudden promulgation, only a week after De Jana had warned Natcher that they would be retaliatory changes in working conditions as recounted above, of detailed disciplinary procedures applicable expressly to solid waste division employees; the summary restriction imposed on these employees as to their access to areas previously open to them; and the written warnings to Hatcher citing events long past—all make out a prima facie case that those actions were undertaken by Respondent as part of its effort to undermine the Union's majority status.

Lapham testified for Respondent that the four-page document was simply a formal codification of existing rules and that the document was issued as part of Respondent's normal efforts to ensure that the drivers continue to perform as conscientiously as they had been in the latter part of the year when they normally receive Christmas gifts from homeowners on their respective routes. That testimony does not seem to comport with Respondent's previous practice in tolerating many of the derelictions as to licenses, drinking, attendance and other matters contained in the record in this case. As to the restrictions on access to different areas of the facility, Lapham attributed those restrictions are essential to deter thefts. In that regard, he noted that one of Respondent's trucks had been stolen in early December; it was however only after the election on December 22 that Respondent saw a need to restrict employee access.

I find unpersuasive the explanations offered by Lapham to rebut the prima facie case presented by General Counsel. I therefore find that the disciplinary procedures as spelled out in the four-page document, the restriction on access, and the written warnings to Hatcher were unlawfully aimed at discouraging the solid waste division employees from supporting the Union.

Discharge of Hatcher

Hatcher began working for Respondent in August 1987. He signed a union authorization card on September l. As noted previously, he was told by De Jana on December 22 that he, in effect, had double-crossed Respondent by voting for the Union that day. That same day he was given two written warnings, found above to have been issued by Respondent in order to undermine employee support for the Union. He was unlawfully passed over for a Christmas bonus and he was discriminatorily denied vacation pay.

Hatcher hurt himself on December 30 when he slipped on an icy patch and was unable to work thereafter for several days. He notified his supervisor of his absence and, when he reported back on January 4, 1990, he had a doctor's note with him. His supervisor asked him if he had a doctor's note and, when he replied that he had, he was told to wait for Lapham to arrive.

Lapham came in later and informed Hatcher that his employment was terminated for failing to report an accident involving his truck. Hatcher asked what he was referring to. Lapham stated ''the house on East Shore Road.'' Hatcher disclaimed responsibility. This discussion referred to an incident that took place on December 28 on Hatcher's route.

Hatcher gave this account. He observed on December 28 a cesspool truck leaving a driveway of a house on East Shore

Road. When he entered the driveway, he noted that there was some brick chipped off the side of the house. On his return to the Port Jefferson facility later that day, he reported this incident to Lapham. He did this because a couple of customers had, in the past, complained that Respondent's drivers had caused damage when they had not.

Lapham testified that Hatcher had reported to him that a house on his route had been ''demolished'' and that Hatcher ''wanted [him] to know that he didn't do it.'' Lapham testified also that he went to the home and after looking at the damage and later examining Hatcher's truck, he concluded that ''it was at least probable or possible'' that Hatcher was responsible. Lapham further testified that, on further examination of Hatcher's truck, [he found] brick on the truck, ''red brick.'' His further investigation he related, convinced him that Hatcher's truck had caused the damage and he decided, ''based on [his] policy of honesty and dishonesty . . . that Hatcher was being dishonest . . . [and] was dismissed.'' Lapham's testimony, that he discharged Hatcher the following morning, December 29, is an obvious error as he had instead issued two warnings to Hatcher on that morning.

There is substantial evidence in the record in this case that gives me considerable pause in accepting Lapham's account that Hatcher was discharged because he dishonestly denied causing the December 28 accident and because his dishonest denial contravened Respondent's concern for honesty and integrity. Respondent had knowingly let unlicensed drivers operate its vehicles and even revised one route so that a driver would not have to pick up in a township in which he had been arrested for driving without a license. Also, Respondent advertised for full-time drivers when, in reality, it wanted only part-time seasonal drivers to help in snow removal work.

I credit Hatcher's account that he was told when he was discharged, that he had failed to report the December 28 incident when in fact he had. I further find that the reason Respondent proferred for Hatcher's discharge, dishonesty, was pretextual.

In view of Hatcher's activities in support of the Union, the animus displayed thereto by Respondent and the pretextual basis given by Respondent for Hatcher's discharge, I find that Respondent terminated his employment on January 4, 1990, as part of its campaign to destroy the Union's majority status, as reflected in the tallying of ballots issued in Case 29–RC–7403.

Discharge of Nicola Diaz

Diaz started working for Respondent in mid-1988 and was discharged on January 19, 1990.

There is no evidence that Diaz signed a union authorization card or attended union meetings. He voted in the election held on December 22 in Case 29–RC–7403. On the next day, according to Diaz, Lapham met him on his route and said, ''[y]ou guys opened up a new world, Welcome to the new world and now that you voted yes, you'll be subject to change and you all have to deal with the consequences now. And they'll be specific things like changes like you all have to wear work boots and all different things, uniforms and stuff like that.''

Lapham testified that he probably indicated to drivers, who would have asked about his disappointment as to the election results, that he was not happy. He also testified that he does not know if he told them that they had ''opened up a whole new world'' or that he said to them, ''welcome to the new world.''

The suggestion in Lapham's account that various drivers may have invited his comments by having asked him about his disappointment with the election results does not strike me as plausible. Diaz' account is more probably true. It is obvious that Diaz was not purporting to give a verbatim account of Lapham's remarks as Lapham is quite articulate. Rather, Diaz was paraphrasing his recollection of the substance of Lapham's comments. I note also the finding above that Respondent unlawfully promulgated new rules within a week of Lapham's comments to Diaz.

I find that Respondent, by Lapham's comments to Diaz on December 23, interfered with the rights of its employees to be free to support the Union.

The General Counsel contends that Respondent's discharge of Diaz several weeks later was aimed at further discouraging its employees from supporting the Union. Respondent asserts that Diaz was discharged because he lied in denying that he was responsible for an accident he had while on his route.

Diaz testified that, on January 18, 1990, Supervisor Barry Zippelius visited him on his route and asked him if his truck had hit one of the houses on the route. Zippelius told him that a homeowner had made a complaint. Diaz denied having any such accident. On the following day, Lapham discussed the complaint with him and he again denied being responsible for any accident. Lapham discharged him the following morning, saying only that ''the homeowner said that she saw [him] do it.''

Lapham testified that he personally examined the truck that Diaz drove on January 18 and determined that there were markings on its back that corresponded exactly with the damage to the brick on the house in question. He also related that the homeowner told him that she had heard a noise and saw one of Respondent's trucks pull out of the driveway. Lapham related that Diaz was discharged for not admitting he caused the accident. Lapham explained that honesty is essential to its operations as Respondent services expensive houses where owners are concerned about property losses and that Respondent must ensure that it has a reputation for integrity.

Lapham also testified that he talked to Terry Klein the helper who was with Diaz on January 18 and said that Klein told him that he was with Diaz when they pulled into the driveway in question and that both he and Diaz had observed the damage complained of. Lapham testified that he theorized that Diaz, while Klein was picking up trash at another house, had backed his truck up the driveway in question on January 18 and hit the house. Lapham testified that he believed that, shortly afterwards, Diaz picked up Klein, returned to that house and in effect pretended that he was surprised to see that there was damage there.

I find it somewhat difficult to accept Lapham's strained scenario. I find it even harder to accept his testimony that Respondent puts a special premium on forthrightness and honesty, when, as noted earlier, it has advertised deceptively for full-time drivers when it really wanted part-time temporary drivers to operate snowplows. I note also the discussion above of its knowingly using unlicensed drivers.

As there is no evidence that Diaz supported the Union, it cannot be found that Respondent discharged him to retaliate against him for having engaged in union activities. The evidence however does disclose that Respondent, on the day after Diaz voted in the election, expressed its anger to him as to the results of the election and made it clear that it would retaliate. Respondent had already discriminatorily discharged three drivers and now was asserting what I find to be a clearly pretextual basis for discharging Diaz. These factors warrant the inference that Diaz was a pawn, expendable as part of Respondent's plan to undermine the Union's majority status and to discourage its employees from supporting the Union. See *Dawson Carbide Industries*, 273 NLRB 382, 388–389 (1984).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having:

(a) Coercively interrogated its employees as to their support for the Union.

(b) Threatened to close or discontinue its solid waste division operations to discourage its employees from supporting the Union.

(c) Warned employees that their wages would be reduced if they support the Union.

(d) Threatened to impose more onerous working conditions and to apply stricter work rules in order to discourage its employees from continuing to support the Union.

(e) Granted a loan to an employee to dissuade him from supporting the Union.

(f) Issued written warnings to an employee to discourage support for the Union.

(g) Offered to reinstate an employee to his job on condition that he withdraw his support from the Union.

(h) Engaged in the conduct described in the next paragraph.

4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having:

(a) Failed to pay William Hatcher a Christmas bonus in December 1989 and accrued vacation pay for that year because he supported the Union.

(b) Imposed more onerous working conditions and stricter work rules on its solid waste division employees because they voted for the Union and by having restricted employee access to previously open areas of its Port Jefferson facility to discourage employees from supporting the Union.

(c) Discharged its employees Anthony Barton, Eric Industrious, Willie Hatcher and Nicola Diaz in order to discourage its employees from joining or supporting the Union.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Eric Industrious, Willie Hatcher, and Nicola Diaz, I shall recommend that Respondent shall be ordered to offer them reinstatement to their former jobs or, if these no longer exist, to substantially equivalent positions of employment and make them whole in accordance with the method prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987).

It appears that Anthony Barton did not have a valid license as of the date of the hearing. Nonetheless, he shall be entitled to be made whole in the same manner as the other three unlawfully discharged employees but is entitled to an offer of reinstatement only when he shows Respondent that he has a valid driver's license. If he is unable to obtain a valid license within a reasonable time from the date of the Board's Decision and Order, Respondent shall offer him a substantially equivalent position. If no such position exists, the Respondent shall make him whole until such time as he finds substantially equivalent employment elsewhere.[4]

Respondent shall also be ordered to make Willie Hatcher whole with interest similarly calculated, for its failure to pay him a Christmas bonus and for vacation moneys accrued in 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, De Jana Industries, Inc., Port Washington, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively questioning employees as to their support for Local 813, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.

(b) Threatening to close down or discontinue its solid waste division operations in order to discourage employees from supporting the Union.

(c) Warning employees that their wages will be reduced if they support the Union.

(d) Threatening to impose on them more onerous working conditions or stricter work rules, in order to discourage their support for the Union.

(e) Granting a loan to any employee to discourage support of the Union.

(f) Issuing written warnings to employees to discourage them from supporting the Union.

(g) Failing to pay any employee a Christmas bonus or accrued vacation moneys in order to discourage support for the Union.

(h) Offering to reinstate any employee to his job on condition that he withdraw his support of the Union.

(i) Discharging any employee in order to discourage support for the Union.

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[4] *Future Ambulette*, 293 NLRB 884 (1989), enfd. 903 F.2d 140 (2d Cir. 1990). I am required to follow Board precedent unless it is reversed by the U.S. Supreme Court.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action neccessary to effectuate the policies of the Act.

(a) Offer Eric Industrious, Willie Hatcher, and Nicola Diaz immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay and other benefits resulting from their discharges, including moneys due Willie Hatcher for losses incurred by him for not giving him his Christmas bonus and vacation moneys respectively. Backpay shall be computed in the manner set forth in the remedy section of this decision.

(b) Offer Anthony Barton full reinstatement to his former job on the presentation to Respondent of a valid driver's license. If Barton is unable to obtain a valid license within a reasonable period of time from the date of the Board's Decision and Order, Respondent shall offer to reinstate him to a substantially equivalent position. Reinstatement shall be without prejudice to his seniority and other rights and privileges. Respondent shall make Barton whole for any loss of pay and other benefits resulting from his discharge, with backpay to be computed in the manner set forth in the remedy section above.

(c) Remove from its files all references to the discriminatory discharges of Anthony Barton, Eric Industrious, Willie Hatcher, and Nicola Diaz and to the written warnings issued to Willie Hatcher on December 29, 1989, and notify each of these employees in writing that this has been done and that evidence of unlawful conduct will not be a basis for future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Port Washington, New York, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''